BRIEF IN SUPPORT OF PETITION.

I.

OPINION OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 131 Fed. (2d) 51, and appears in the record beginning at page 247. The findings of fact and conclusions of law of the District Court appear in the record beginning at page 222.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court are invoked appears in the petition, and is therefore not repeated here.

III.

STATEMENT OF THE CASE.

A statement containing all that is deemed material to the questions presented appears in the petition under the heading, "Statement of the Matter Involved," to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in each of the following respects:

(a) In failing to defer to and follow the conclusion of the District Court (V, R. 229) that the contingent liability of the Pigments Company to DeLore was sufficiently disclosed so as to prevent a recovery by the Lead Company against Nulsen on his agreement, and in holding, contrary

to Missouri decisions, that the Lead Company could not be bound by the fact that it treated such liability as shown (R. 255).

(b) In holding, contrary to Missouri law, that principles relative to the disregarding of corporate entities prevented application of the rule that a person, not a party of record to a suit, is nevertheless bound by a judgment therein if he has a direct interest and has the right and opportunity to make defense or control the proceeding (R. 257-259).

(c) In failing to hold, in accord with Missouri decisions, that where a defense might have been asserted, a defendant is concluded by an adverse judgment the same as if it had been pleaded.

(d) In holding (R. 260-261) that in the suit against the Pigments Company the defense of Nulsen's guarantee would not have been pertinent or directly defensive, and that it would have been in the nature of a counterclaim or a plea in confession and avoidance, inconsistent with a general denial, this being squarely in conflict with the law as declared by the Supreme Court of Missouri.

V.

ARGUMENT.

A.

The contingent liability of the Pigments Company to DeLore was recognized by the Lead Company to have been shown on the audit attached to its contract of May 23, 1923, with Nulsen, and its existence was in fact disclosed thereby. In such situation the Lead Company should not be permitted to sue Nulsen on the theory that such liability was not so shown.

State v. Trimble, 301 Mo. 146, 256 S. W. 171, l. c. 173;
Missouri Service Co. v. City of Stanberry, 341 Mo. 500, 108 S. W. (2d), l. c. 30;
St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121, l. c. 128;
Haseltine v. Farmers Mutual Ins. Co. (Mo. Sup. 1924), 263 S. W. 810;
McFarland v. Gillioz, 37 S. W. (2d) 911, l. c. 916, 327 Mo. 690;
Thomas v. Utilities Bldg. Corp., 335 Mo. 900, 74 S. W. (2d) 578, l. c. 582.

Under the heading, "The Questions Presented," III (a) of the petition preceding, we set forth briefly the basis for this portion of the argument. An elaboration appears under section I of Appellee's Petition for Rehearing (R. 265-267) and, to avoid repetition, we respectfully refer this Court thereto.

Of the Missouri authorities applicable to the question, and cited above, attention is drawn specifically to State v. Trimble and Missouri Service Co. v. City of Stanberry. The first of these holds (256 S. W., l. c. 173) that "outside evidence may be admitted to reach what the parties intended," when a contract by its terms is subject to dif-

ferent meanings, concerning which reasonable minds may reach opposite conclusions. In the latter case it was said (108 S. W. [2d], l. c. 30):

> "It is an axiom of interpretation that 'the construction which the parties place upon language is the criterion of its meaning.'"

St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121, l. c. 128, is authority for the holding that the question whether parties to a contract, by their conduct "had clearly shown their intention and meaning, as embodied in its language," is "a question of fact, and not of law."

Here the District Court was the trier of the issues of fact. It found them, in this regard, adversely to the Lead Company's contention (R. 228), and with its findings amply supported, the Circuit Court of Appeals was in error in disturbing them.

B.

The Lead Company had not only a right, which it exercised, but also an obligation, to control and participate in the defense of the suit brought by Nulsen against the Pigments Company. In such situation the Lead Company is as bound by the adverse judgment as its subsidiary, in whose name it defended the case.

State v. Stone, 269 Mo. 334, 190 S. W. 601, l. c. 603;
Owen v. Gilchrist, 304 Mo. 330, 263 S. W. 423, l. c. 430;
Womach v. St. Joseph, 201 Mo. 467, 478;
State ex rel. National Subway Co. v. St. Louis, 145 Mo. 551, 567;
Wood v. Ensel, 63 Mo. 193, 194;
Strong v. Phoenix Ins. Co., 62 Mo. 289, 295;
30 Am. Jur. 960-961, Judgments, Sec. 227;
Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 61 L. Ed. 1148;
United States Envelope Co. v. Transco Paper Co., 221 Fed. 79;

David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980;
Carson Investment Co. v. Anaconda Copper Mining Co., 26 Fed. (2d) 651, l. c. 657;
Hy-Lo Unit & Metal Prdts. Co. v. Remote Control Mfg. Co., 83 Fed. (2d) 345;
National Nut Co. v. Sontag Chain Stores Co., 107 Fed. (2d) 318, l. c. 322.

The opinion of the court below neither mentions, nor, apparently, gives any effect whatever to the fact that on October 31, 1936, while Nulsen's suit against the Pigments Company was pending and about six months before the trial thereof, the appellant took over the assets of the Chemical Company and assumed its "debts, liabilities and obligations" (R. 180, 182). Appellant's report to the Securities Exchange Commission showing the liquidation of its wholly-owned subsidiary as of that date (R. 211-214) also went unnoticed.

These facts in part served as a basis for paragraphs 3 and 6 of the trial court's findings of fact (R. 223-225), and for paragraphs II, III and IV of its conclusions of law (R. 228, 229). If proper consideration be given to those facts and to their legal effect, the errors of the present opinion in its application of Missouri law, on questions of privity, of estoppel by judgment, and of the doctrine of res judicata, will be patent.

The dates involved in the litigation here were: Nulsen commenced his suit against the Pigments Company on August 19, 1931 (R. 76); on October 31, 1936, the Lead Company took over the assets and assumed the obligations of the Pigments Company, and liquidated it (R. 180, 182, 211-213); and thereafter the Lead Company conducted the defense in the suit against the Pigments Company (R. 225, Findings, par. 6, and facts referred to therein).

In this connection, and with reference to the mention in the opinion that Nulsen elected to sue the subsidiary

without joining the Lead Company (R. 251, 259), it may also be pointed out that there is no evidence whatever that Nulsen had any knowledge of the contracts of October 31, 1936, between the companies at any time during the pendency of his suit against the Pigments Company. The evidence with respect thereto was first developed at the trial of the instant proceeding.

But whatever may be the law bearing on the question of privity, the circumstances here eliminate the necessity of its further consideration. Those circumstances, overlooked by the court below, bind the Lead Company as a party to the former proceeding, under Missouri law. In **Womach v. St. Joseph**, supra, cited several times in the opinion, the following "oft-quoted passage" from 1 Greenl. on Ev. (16 Ed.), Sec. 523, appears (201 Mo. 478):

> "Under the term **parties**, in this connection, the law includes all who are directly interested in the subject matter, and had a right to make a defense, or to control the proceedings, and to appeal from the judgment."

That other Missouri decisions are in accord is to be concluded from the following quotation appearing in the opinion in **State v. Stone**, 269 Mo. 334, 190 S. W. 601, l. c. 603:

> "Whenever a party is interested in the subject matter of pending litigation, and is placed in the control and management of the defense therein, he is just as much bound by the judgment in the cause as the real defendant, in whose name the defense is made."

Also in **Owen v. Gilchrist**, 304 Mo. 330, 263 S. W. 423, l. c. 430, it was said:

> "The general rule seems to be that a person not made a party of record to the suit is nevertheless bound by any judgment rendered therein if he has a direct interest in the subject matter of the suit and

has the right and opportunity to make defense or control the proceeding."

The following, from 30 Am. Jur. 960-961, Judgments, Sec. 227, also sustains our contention in this regard:

> "The strict rule that a judgment is operative under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties. Under this rule, a concealment of his interest by one who defends an action in the name of another is not regarded as sufficient to avoid the rule of res judicata."

For other Missouri cases, see, also, **State ex rel. National Subway Co. v. St. Louis**, 145 Mo. 551, l. c. 567; **Wood v. Ensel**, 63 Mo. 193, 194; **Strong v. Phoenix Ins. Co.**, 62 Mo. 289, 295. In the last case cited it was said, following a statement similar to those above:

> "The rule may be succinctly stated thus: Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it. This is the doctrine deduced from the whole current of authorities on this subject."

The decisions of this Court in **Hart Steel Co. v. Railroad Supply Co.**, 244 U. S. 294, 61 L. Ed. 1148, and of federal courts generally (see those cited at the beginning of this section), announce the same principle.

It is submitted that the Court erred in applying the rule that the corporate entities could not be disregarded, and we urge that such ruling squarely conflicts with the applicable law to which we have referred.

C.

Where the basis of a cause of action asserted by a plaintiff, to defeat the effect of a previous adverse judgment, might have been asserted as a defense in the former action, the doctrine of res judicata or merger and estoppel by judgment applies. The applicable rule in such a case, both in Missouri and generally, is that the failure to make the defense is as conclusive upon the plaintiff in the second action as if made and adjudicated.

These propositions are fully supported by the following Missouri decisions, not one of which is considered nor even mentioned in the opinion below:

Lyman v. Harvester Co., 68 Mo. App. 637;
Norman's Land & Mfg. Co. v. Idalia R. & D. Co., 226 S. W. 43, 205 Mo. App. 474;
Williams v. City of Hayti (Mo. App.), 184 S. W. 470, l. c. 473;
Marston v. Catterlin, 290 Mo. 185, 234 S. W. 816;
Greenabaum v. Elliott, 60 Mo. 25, l. c. 31;
Nelson v. Nelson, 221 S. W. 1066, 282 Mo. 412;
Donnell v. Wright, 147 Mo. 639, l. c. 646-647;
Emmert v. Aldridge, 231 Mo. 124, l. c. 129;
Rhodus v. Geatly, 347 Mo. 397, 409-410;
U. S. v. Lufcy, 49 S. W. (2d) 8, 329 Mo. 1224.

Also by the following decisions of this Court:

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195;
Dowell v. Applegate, 152 U. S. 327, 38 L. Ed. 463;
New York Life Ins. Co. v. Bangs, 103 U. S. 780, 26 L. Ed. 608;

Gila Bead Reservoir Co. v. Gila Water Co., 205 U. S. 279, 51 L. Ed. 801;
Chico County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329.

Also by decisions of Circuit Courts of Appeal, following:

Linton v. Omaha Wholesale Produce Market House Co. (8th Circ.), 218 F. 331;
Guettel v. United States (8th Circ.), 95 F. (2d) 229, cert. denied 305 U. S. 603;
Engebretson v. West (8th Circ.), 111 F. (2d) 528;
Warburton v. Trust Co. (3rd Circ.), 182 F. 769.

The Circuit Court of Appeals' opinion ignores the doctrine we have set out above and the Missouri decisions which declare it. The Court, on the other hand, leans for support upon the **general** rule, also announced by Missouri decisions, that (R. 257):

> "* * * where the demands are different, . . . a former judgment is not conclusive in a subsequent action of any fact not distinctly put in issue, litigated, and directly determined in the former action. The estoppel in such a case cannot 'extend beyond the point actually litigated and determined.'"

A similar statement is made subsequently in the opinion (R. 259-260).

What the Court has overlooked is that this general rule is not so applied as to permit a defendant in one action, who has suffered judgment there, to bring forward as plaintiff, and, as the basis for another cause of action, a contention which might have been asserted as a defense in the first.

It must be recognized that in such a case as this the "demand" or "cause of action" sought to be asserted by a defendant on becoming a plaintiff could never be the **same** demand or cause of action upon which he was first

sued. Yet the Court has in effect ruled here that, because they are not the same, a defendant may never be precluded from withholding a defense and later using it as a basis for relitigating a liability.

We shall first examine here some of the decisions of this Court, to show the validity of our distinction, then those of the Eighth Circuit and Missouri courts.

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, rightly regarded as a leading case, was **not** one involving a defendant, turned plaintiff, seeking to assert a contention which in the earlier action he might have asserted as a defense. It is therefore not controlling of the instant case. (The same is true of the several Missouri decisions cited in the opinion as sustaining the rule there announced.) But the Cromwell case, by way of *obiter*, speaks of the conclusiveness of a judgment rendered on a promissory note, as against the subsequent assertion of such perfect defenses as forgery, want of consideration or payment, even though these were not brought into issue by appropriate pleading and proof. Justice Field wrote (24 L. Ed. 197-198):

> "If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

Also in the Cromwell case there is quoted with approval the decision in Henderson v. Henderson, 3 Hare 100. In that case A, and others, were required to render an account of an estate and certain transactions. A subsequently sought, in a separate action, instituted by himself, to assert claims against the estate. In such situation, as quoted by this Court (24 L. Ed. 199-200):

> "The plea of res judicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged **to the subject of litigation,** and which the parties, exercising reasonable diligence, might have brought forward at the time." (Our emphasis.)

If clarification be needed, it is found in an abundance of later decisions, both federal and state.

In **Dowell v. Applegate,** 152 U. S. 327, 38 L. Ed. 463, plaintiff Applegate claimed title to a forty-acre tract of land and sued to remove a cloud created by a deed to defendant decreed to him in an earlier proceeding in which plaintiff had been a party defendant. The Court, speaking of this defendant in the earlier proceedings, said (38 L. Ed., l. c. 465):

> "He made no reference in his answer to, and, so far as the record before us discloses, did not introduce in evidence, the deed for the forty acres made to him October 8, 1874, by William H. H. Applegate, **although that deed is made by his bill in the present action the foundation of his claim to that tract."** (Our emphasis.)

After reviewing the proceedings in the first suit and the decree therein, the Court discussed the controlling precedents and ruled thus:

> "* * * Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to Dowell's demands—which description included the 40 acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit based solely upon a title that

he was at liberty to set up, but chose not to assert, before the decree was rendered.

"The argument to the contrary seems to rest principally if not altogether, **upon the ground that the present suit is upon a cause of action entirely different from that presented in the suit in the Federal court. In that view, our attention is called to the case of Cromwell v. Sac County,** 94 U. S. 351; Russell v. Place, 94 U. S. 608, and Bissell v. Spring Valley Twp., 124 U. S. 231."

"* * * So far from the above cases sustaining the decision of the Supreme Court of Oregon, they support the views we have expressed. The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the controversy that arose, and was determined in the suit in the Federal court as to the right of Dowell to have all the lands described in his bill subjected to his claims. **While the position of the parties is reversed, Daniel W. Applegate,** who contested that right, in the suit in the Federal court—so far as that suit related to the lands then claimed by him, including the 40 acres here in dispute—**seeks, under the guise of a new suit, to obtain a re-examination of that question.** And he seeks such re-examination, not upon any ground of fraud in obtaining that decree, but in the light simply of the conveyance of October 8, 1874, from W. H. H. Applegate, which conveyance, although existing before Dowell commenced his suit, indeed, before Dowell acquired any judgment lien of record, **he deliberately refrained from bringing to the attention of the Federal court, in some appropriate form, in support of his defense. The presenting in this suit of the fact of that conveyance,** for the purpose of showing that the 40 acres in question should not have been subjected to sale for Dowell's demands, **does not, within the rule announced in the case above cited, make a different claim or demand.** On the contrary, the matter now presented was embraced by the issues in the suit in the Federal court, and was then determined, when that court, upon final hearing, adjudged

that the 121.55 acres (which embraced the 40 acres now in dispute) should be sold to pay Dowell's claims. The case consequently comes within the rule that 'a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.'" (Our emphasis.)

New York Life Insurance Company v. Bangs, 103 U. S. 780, 26 L. Ed. 608, involved an attempt to cancel insurance policies for fraud in their procurement after a judgment had been recovered for their proceeds. The language of Justice Field there, citing the Cromwell case, is of particular significance (26 L. Ed., l. c. 609):

> "When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or **release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration.** A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. **The contract is merged in the judgment.** Cromwell v. Sac Co., 94 U. S. 351." (Our emphasis.)

In **Gila Bend Reservoir etc. Company v. Gila Water Company**, 205 U. S. 279, 51 L. Ed. 801, l. c. 803, it was said:

> "A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled."

Then there is the case of **Chicot County Drainage District v. Baxter State Bank**, 308 U. S. 371, 84 L. Ed. 329, decided in 1940, and which reversed the decision of the Eighth Circuit Court. Plaintiffs there sought to recover on bonds issued by defendant drainage district in which a readjustment of the indebtedness in a proceeding under

the Bankruptcy Act was set up as a defense. The constitutionality of the provisions of the act was not attacked in the first proceeding, but it was in the second. On this point it was ruled (84 L. Ed. 334-335):

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, supra; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, supra."

Similar rulings were announced by the Eighth Circuit Court in **Linton v. Omaha Wholesale Produce Market House Co.**, 218 Fed. 331, and by the Court in the Third Circuit in **Warburton v. Trust Company**, 182 Fed. 769. In both of these cases it was held that plaintiffs were barred and estopped from the assertion of causes of action where the issues presented to sustain the same might have been litigated (even though they were not) in prior actions **in which such plaintiffs had suffered judgments as defendants.**

The applicability to the situation here presented of the Linton case is found in the following, quoted from the opinion of Judge Adams (218 Fed., l. c. 335-336):

> "Contention is made that the deed of Mrs. Linton to Mr. Linton, dated May 1, 1897, conferred upon him some right in addition to or different from the right acquired by him by means of the Remnant deeds, and that the present action, in so far as Mr. Linton grounds his right upon the deed of May 1, 1897, **presents a dif-**

ferent claim or demand from that involved in the Becker suit, and that as a result the judgment in that case is not res adjudicata of his present claim. We fail to see any merit in this contention. Whether Mr. Linton acquired legal title to the premises by one deed or another is not material. . . . But let it be conceded that Mr. Linton did acquire some additional support to his pretensions by the deed of 1897; **inasmuch as that was available to him in the Becker suit as a defense to the contention of Becker, the judgment rendered in that suit is just as conclusive against the prosecution by Mr. Linton of a second action based on that deed as it would have been had that deed been actually pleaded or proved as a part of his case in the Becker suit.** The judgment in that case was a finality, not only as to what was offered and received to sustain or defeat the claim or demand therein involved, but as to any other admissible matter which might have been offered for that purpose." (Our emphasis.)

In the Warburton case is the following (182 Fed., l. c. 775):

"A party cannot split up his defenses, but must put in all that he has, or else forego them. This does not apply, of course, to an equitable defense in a federal court in an action at law, nor to an independent matter of set-off, except where there is a statute which requires it. But if a legal defense, which is available, is omitted, it cannot be asserted afterwards. In the present instance the plaintiff denied liability in the former litigation, on the ground that he had been induced to go into the enterprise by fraudulent misrepresentation. 158 Fed. 969, 86 C. C. A. 173. **But if there were other grounds by which he was equally relieved he was just as much required to put them in, as he was to put in that one. He could not choose on which one of them he would defend and reserve the others, and it does not matter, therefore, whether or not any issue was made on them.**" (Our emphasis.)

That this is the law in Missouri is clearly established by the decisions of the courts of that state cited above. In the **Greenabaum** case the Court said, denying a plaintiff the right to recover money paid defendant on a former judgment obtained by the latter (60 Mo., l. c. 31):

> "Where a defendant has been legally in court, and fails or neglects to make his defense if he has one, the judgment will be conclusive upon him, unless he can show some ground for equitable interference."

In the **Williams** case the following pertinent language appears (184 S. W., l. c. 473):

> "The very matter in the answer here, in this regard, could have been pleaded there, and, **whether pleaded or not**, the estoppel by judgment is complete." (Our emphasis.)

And in the **Marston** case it is similarly stated (290 Mo., l. c. 294):

> "It is a familiar doctrine that where a defense might have been pleaded, the defendant is concluded by the judgment as to that defense the same as if it had been pleaded and evidence introduced in its support."

The rule has been affirmed also in the recent case of **Rhodus v. Geatley**, 347 Mo. 397, at pages 409 and 410, thus:

> "There remains therefore only the case of Annie Kary. It is true that as to her the questions here involved were not in issue. In this state we have accepted the doctrine, however, that where certain matters could be put in issue by an answer and are not, the decision of a case against the party who might have pleaded them but did not may be taken as an adjudication of such matters in future litigation."

In **U. S. v. Lufcy**, the Missouri Supreme Court declared (49 S. W. [2d], l. c. 14):

> "It is also well settled that a former judgment is a bar, not only as to all matters which were raised, but also to all defenses which could have been raised."

In **Donnell v. Wright** the same court considered the argument that because a particular contention was not in issue in a former trial it should not be considered as adjudicated. Judge Brace aptly said, as might be said of the opinion here (147 Mo., l. c. 646):

> "The mistake consists in regarding each issue in the case, as a separate and independent cause of action."

After then giving the quotation from **Henderson v. Henderson**, *supra*, which we have set out, and referring to other decisions, the Court said (l. c. 647):

> "This is not only the English rule and the rule in this state, but generally 'the tendency of the American cases is to regard all the issues which might have been raised and litigated in any case to be as completely barred as if they had been directly adjudicated and included in the verdict' (21 American and English Encyclopaedia of Law, 216 and 217, and notes)."

Norman's Land & Manufacturing Company v. Idalia Realty and Development Company distinctly demonstrates that under Missouri law the question presented where a defendant turns plaintiff is one of merger of causes of action, rather than one of "identity of demands or causes of action," as ruled by the court below. In that case the plaintiff, who had previously been sued as defendant in ejectment, sought to recover, for money had and received, an amount which he had been required to pay on the ejectment judgment. It was contended that the amount in ques-

tion represented the rental value of houses on the land which were in still another proceeding determined to belong to the plaintiff in the last action. The issue of his ownership of the houses, by mutual mistake, so it was said, had not been presented or decided in the ejectment suit, and he contended that there was therefore no identity of issues or causes of action such as to constitute an estoppel by judgment. Ruling against this contention, the Court said (226 S. W., l. c. 45-46):

> "It is a trite doctrine that all the issues which might have been raised and litigated in any case shall be regarded as completely barred as if they had been directly adjudicated and included in the judgment. So that it is not only to the points upon which the court was actually required by the parties to form an opinion and pronounce judgment that the doctrine of res adjudicata applies, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Greenabaum v. Elliott, 60 Mo. 25; Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; Spratt v. Early, 199 Mo. 491, 97 S. W. 925. Were this not the rule, a case could be tried piecemeal, and 'we would never reach the end of a lawsuit.' McLure v. Bank, 263 Mo. 128, 172 S. W. 336. * * * We are clearly of the opinion, and so rule, that the failure to make the defense is as conclusive upon plaintiff as if made and adjudicated."

In failing to apply the foregoing principles, established as the law by Missouri courts, by this Court, and previously by the Eighth Circuit Court, we sincerely consider that the opinion here has fallen into grievous error.

D.

The guarantee by Nulsen that the Pigments Company had no liabilities except those shown by the audit was, by its express terms, made enforceable "by both the National Pigments and Chemical Company and the National Lead Company" (R. 43). If the liability for which he sued the Pigments Company was within this guarantee, then a plea of estoppel by contract could and should have been asserted as a defense. It would not have been inconsistent with a general denial.

Nulsen v. National Pigments & Chemical Co., 145 S. W. (2d) 410, 346 Mo. 1246;
31 C. J. S. 448-449;
49 C. J. 220;
Field v. National City Bank, 343 Mo. 419, 121 S. W. (2d) 769;
Sullivan v. Bank of Harrisonville (Mo. Sup.), 293 S. W. 129;
Woodson v. Williams (Mo. Sup.), 204 S. W. 183;
Excelsior Steel Furnace Co. v. Smith (Mo. App.), 17 S. W. (2d), l. c. 380;
Palais du Costume Co. v. Beach, 129 S. W. 270, 144 Mo. App. 456;
Aull v. Mo. Pac. Ry. Co., 136 Mo. App. 291, 116 S. W. 1122, 1124;
Bay v. Trusdell, 92 Mo. App. 377.

The opinion below says (R. 260):

> "The plaintiff's cause of action in the present case for breach of the contract of May 14, 1923, was neither pertinent nor directly defensive to the claim made by Nulsen in the former case."

If by "plaintiff's cause of action in the present case" is meant the **basis** of such cause of action, which it must, and that was the alleged warranty or guaranty contained in the contract, we fail to understand the statement. Nul-

sen asserted, simply, that the defendant there was liable to him on a certain obligation. Why would it not have been both pertinent and defensive for the defendant to have answered: "If such obligation otherwise exists, yet you cannot sue thereon because you expressly warranted and guaranteed that there was no such obligation, and you yourself assumed it if it does exist; **you are estopped from asserting its existence!**"?

Indeed, that precisely is the answer the defendant there attempted to make, but for the first time in the Missouri Supreme Court (346 Mo. 1246).

The opinion also says (R. 261):

> "The cause of action in the present case (meaning, we assume, paragraph 7 of the May 14, 1923, contract), if pleaded and proved by the Chemical Company in the case in the state court, would not have negatived agency. The plea would have been an affirmative defense **in the nature of a counterclaim or of a plea in confession and avoidance.**" (Our emphasis.)

And, further:

> "Moreover, even though paragraph 7 of the contract of May 14, 1923, was made for the benefit of the Chemical Company as well as for the plaintiff, this paragraph could not under Missouri law have been pleaded as a defense, **either as ground for avoidance or as a counterclaim**, in connection with a general denial in the case in the state court."

Decisions of Missouri courts are then cited, stating the rule that defenses included in an answer **and counterclaim** must be consistent with each other, and that "the test is whether the proof of one defense **necessarily disproves** the other."

The fundamental errors here in the opinion are in its holdings that the defense in question would have been

either a **plea in avoidance or a counterclaim**, and that it would **necessarily** have disproved or refuted the general denial.

These holdings are in direct conflict with the law in the case, decided by the Missouri Supreme Court. That Court held that the defense was one of **estoppel by contract**, which, if valid, should have been affirmatively pleaded. Considering the very matter here under discussion, urged as a basis for defeating Nulsen's right to recover, the state court said (Nulsen v. National Pigments & Chemical Co., 346 Mo., l. c. 1253):

> "Plaintiff was entitled to recover, unless prevented by some affirmative defense presented to and considered by the trial court.
>
> "Estoppel by the express terms of a subsequent contract entered into between plaintiff and a third party was an affirmative defense, not pleaded, and upon which no requests for findings of fact or declarations of law were made. * * * The affirmative defense of estoppel, sought to be presented in this court for the first time, may not be considered."

The defense, then, by expressly declared Missouri law, would have been that of estoppel. Specifically, it would have been that Nulsen, by his guarantee that there were no liabilities of the company other than those shown on the audit, was estopped from asserting one not so shown. Such a plea certainly is **defensive**; it as certainly is not in the nature of a counterclaim, or for recoupment (as the opinion of the court below seems to have considered it). It might be considered as in avoidance, but not as a confession and avoidance, any more than the Statute of Limitations (which was pleaded by the Pigments Company in Nulsen's suit). The defense of estoppel by contract neither affirms nor denies the plaintiff's claim or cause of action; it merely denies his right to assert it. To clarify this, we quote from 31 C. J. S. 448-449:

"The issue which a plea of estoppel presents is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist on them.

"A plea of estoppel is not a plea of confession and avoidance, although it has been stated that it is in the nature of such a plea. While the plea is spoken of as a plea in bar, it is not technically such, although, like a plea in bar, it denies the right of action or defense, by denying the right to assert the facts. So the rule that the pleader, if he does not demur, must either traverse or confess and avoid all of the material allegations to which he makes answer, has no application to pleadings in estoppel which are considered to be an exception to the rule."

And, in 49 C. J. 220, it is said:

"Under the rule allowing the pleading of denials and affirmative defenses where not inconsistent, . . . estoppel . . . and settlement have been held to be defenses that may be pleaded together with a denial."

In the light of the foregoing, we respectfully suggest that the discussion in the opinion below (R. 261-262), of Missouri cases dealing with the questions of the necessity of pleading matters of recoupment and of counterclaim and of the propriety of pleading inconsistent defenses, is indeed far afield.

Why, in support of its ruling, the opinion cites **Excelsior Steel Furnace Co. v. Smith** (Mo. App.), 17 S. W. (2d) 378, 380, is difficult to understand. That case is the only one of the very many cited by the appellee below (petitioner here) which the opinion notices by so much as a citation. It holds as follows:

"Respondent contends that the general denial amounted to nothing because it was coupled with a confession and avoidance. There are some early cases in this state which seem to treat pleas in avoidance as

pleas of confession by implication. **This is not the rule which now prevails in this state. Under the later decisions, it is permissible to file a plea in avoidance without confessing the allegations in the petition and in the same answer to traverse the allegations of the petition by a general denial.** It is only when the plea in avoidance is necessarily inconsistent with the general denial that the one destroys the other (citing cases).

"Argumentative denials following positive denials and asserting that, if the facts denied were true, still plaintiff could not recover for other reasons, do not destroy the effect of the specific denials nor of a general denial. Sullivan v. Bank of Harrisonville (Mo. Sup.), 293 S. W. 129." (Our emphasis.)

Also, in the recent Missouri Supreme Court case of **Field v. National City Bank of St. Louis**, 343 Mo. 419, 121 S. W. (2d) 769, is found a further answer to the conclusion of the court below in this regard. That was an action for the value of certain property claimed to have been wrongfully obtained from plaintiff by defendants. Answers were filed containing general denials, specific denials that the property in question was ever received by defendants from plaintiff, and further pleas that defendant had released any claim he might have had (l. c. 772). In this situation, and answering plaintiff's contention that "defendants waived their general denial by their subsequent plea of confession and avoidance," the Court ruled (l. c. 774-775):

"To so construe defendants' pleadings would be too technical and violate the rule stated in Sec. 801, R. S. 1929, Mo. St. Ann., Sec. 801, p. 1052 * * *. The affirmative defense of release was not a statement of new matter inconsistent with a general denial (citing authorities) * * *. Pleas that amount to both a denial and an admission of exactly the same thing are of course inconsistent and that was the situation in the cases cited by plaintiff. State ex inf. Hadley v.

Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; Cowell v. Employers' Indemnity Corp., 326 Mo. 1103, 34 S. W. (2d) 705. We hold that the special pleas here do not affect the general denial."

See, also, in this connection:

Sullivan v. Bank (Mo. Sup.), 293 S. W., l. c. 131;
Woodson v. Williams (Mo. Sup.), 204 S. W. 183, l. c. 184;
Palais du Costume Co. v. Beach, 129 S. W. 270, 144 Mo. App. 456;
Aull v. Mo. Pac. Ry. Co., 136 Mo. App. 291, 116 S. W. 1122, l. c. 1124;
Bay v. Trusdell, 92 Mo. App. 377 (holding that in an action on a note defendant may plead both *non est factum* and payment).

Petitioner urges that on this single question the Circuit Court of Appeals does treble violence to Missouri law: (1) It deals with the defense under discussion as one of recoupment or counterclaim instead of one of estoppel; (2) turning, then, with indecision, to the thought that the defense might be regarded as a plea in avoidance, it treats it as one which necessarily would have confessed, and (3) it winds up with an apparent holding that it would have been a defense inconsistent with, or "necessarily disproving," the defense asserted by way of denial.

Such an opinion, with its obviously confusing results, calls impellingly for review and correction.

CONCLUSION.

Under the doctrine, now so well established, demanding that the federal courts follow the settled rules of decision of the state courts in matters of local law, we urge that the opinion of the court below in this case has fallen into grievous error, in many particulars. With a realization

that great public questions confront our courts, we yet in sincerity believe that even now the smaller private litigations should not go unobserved and unsupervised by this Court, if in them are things that foster confusion in settled and salutary doctrines of justice. We, therefore, respectfully but earnestly declare that in the opinion here sought to be reviewed there are such things; that principles of importance are involved, and that this Court should exercise its discretionary power to review, to clarify, and to correct.

Respectfully submitted,

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